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Supreme Court of the United States

October Term, 1960

No. 11

GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, *et al.*,

Appellants,

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., *et al.*,

Appellees.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND CIVIL LIBERTIES UNION OF MASSACHUSETTS, *AMICI CURIAE*

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Interest of *Amici*

This Brief is presented with the consent of the parties, filed with the Clerk of this Court. The American Civil Liberties Union and its affiliate, the Civil Liberties Union of Massachusetts, regard the separation of Church and State as fundamental to a pluralistic democratic society. We are, therefore, concerned that governmental sanctions should not be imposed from religious considerations.

The Statute Involved

Massachusetts General Laws (Tercentary Edition) Chapter 136, Sections 5 and 6, entitled "Observance of the Lord's Day." These are set out in the Appendix to this Brief (p. 18).

Statement of the Case

The facts are fully set forth in the briefs of the parties. Appellees, a Massachusetts corporation which operates a Kosher butcher and grocery market, three Orthodox Jewish customers of the market appearing as representatives of a class, and the Chief Orthodox Rabbi of Springfield appearing as representative of the Massachusetts Council of Rabbis, sought to enjoin as applied to themselves and their classes the enforcement of the Massachusetts "Lord's Day" statute as violative of the Federal Constitution. A statutory three-judge court granted the relief prayed. On appeal, this Court noted probable jurisdiction on April 25, 1960.

Summary of Argument

An analysis of Chapter 136 demonstrates that it establishes a religious institution. This is clear from its origin, its avowed purpose, its history, both legislative and judicial, including the controversies which have been stirred by it; and the response of the Legislature to those controversies. It is a law respecting the establishment of religion and, therefore, in violation of the Fourteenth Amendment of the United States Constitution. It cannot be saved by this Court incorporating into it a secular utility.

ARGUMENT

I. The origin, avowed purpose, legislative history and judicial interpretations of the statute attest to its religious purpose.

A. The Origins of Chapter 136 are Religious.

It is generally conceded that the Seventeenth and Eighteenth Century origins of the Lord's Day Laws are religious (p. 43, Appellant's Brief; Record pp. 62-63, and

154).[1] This is obvious from an inspection of any of the solemn preambles to the various early statutes cited in Judge Magruder's Opinion, Record pp. 139-140.

The religious character of the Lord's Day Laws was explicitly recognized by the Legislature in 1814 (See Report of the Legislature on the Observance of the Sabbath, p. 7). In that year it adopted a measure:[2]

> "That each minister be requested to read in his pulpit, on the Sabbath, the existing laws, for the due observance of the Lord's Day, and to address the people on the subject; pointing out as fully and explicitly as the occasion and the circumstances of his people may require, according to his own judgment, the importance and value of the Sabbath, and the reasons which bind us to observe it, and to obey the laws of the Commonwealth. * * *"

The Report of the Committee which recommended this measure stated (p. 6):

> "We believe that without the appointment and continuance of the Lord's Day, public instruction and worship would soon languish, and perhaps entirely cease; that private worship and the best virtues of social life would share the same fate; that the scriptures, containing the records, the principles, the duties, and the hopes of our religion, would soon pass from the recollection of multitudes of our citizens. * * *"

B. The Avowed Purpose of General Laws, Chapter 36, "Observance of the Lord's Day", is Religious.

"Observance of the Lord's Day" has been the designation of the Lord's Day Law from the Revised Statutes of 1836 (Chapter 50) through the various revisions and com-

[1] For the English origins of the Lord's Day Laws see A. H. Lewis "Sunday Legislation" (N. Y. 1902).

[2] Harvard College Library, U. S. 12670.75.

pilations of the Massachusetts law. (General Statutes, 1860, Chapter 84; Public Statutes, 1882, Chapter 98; Revised Laws, 1902, Chapter 98; General Laws, 1921, Chapter 136; General Laws, 1932, Ter. Ed., Chapter 136). In fact this title goes back further. The Act of 1692 (Massachusetts Bay Province Acts, 1692-1695, Chapter 22) is entitled "An Act For The Better Observance And Keeping Of The Lord's Day", and the compilation of 1782 is entitled "An Act For Making More Effectual Provision For The Due Observation Of The Lord's Day, And For Repealing The Several Laws Heretofore Made For That Purpose." In the Act of 1782, Chapter 23, Section 6, The "Lord's Day" is referred to as "Holy Time". The designation "Lord's Day", as the Appellant's Brief points out (p. 3), has been consistently used in Lord's Day legislation since 1647; and, indeed, it is the designation employed by the Legislature in its most recent enactments. For example, Acts of 1955, Chapter 304, is entitled, "An Act Authorizing The Sale Of Live Bait On The Lord's Day."

The term "Lord's Day" has a religious and Christian content confirmed by 2000 years of association with the most significant event in Christian history. Writing in 1948, the Reverend Horace C. Cowan traces the phrase from Revelations and characterizes it as "the scriptural name of the first day of the week * * * the Lord's Day is so-called because of the resurrection of the Lord Jesus Christ from the dead on that day." (Reverend H. C. Cowan "The Sabbath in Scripture and History", p. 98). See also Encyclopedia Brittanica, 11th Ed. Vol. 26, p. 94. George S. Gray in his "Eight Studies of the Lord's Day", p. 3 (Cambridge, 1884), points out that "Lord's Day" is a religious term not only in theological discussion but in lay conversation:

> "The Lord's Day is a third name, essentially Christian. It comes from the New Testament. It is very seldom used by any who are not believers of the Lord Jesus Christ * * * If in any company one should mention Sunday, the use of that name would

> afford no hint whatever of the person's religious position * * * If, however, one spoke of the Lord's Day, all would suppose that he who uttered this name was a believer. Indeed, the natural inference would be that all were believers. For even a believer would not be apt to use this name except in addressing those of similar faith."

The use of the designation "Lord's Day" has not passed unnoticed. A pamphlet originally prepared in 1869 for a meeting of the Free Congregational Society of Florence, Massachusetts, entitled "The Power of the Legislature to Enact Sunday Laws" (Northampton, 1870, Harvard Law School Library), notes that:

> "The title to our present statutes show the object to be the enforcement of a religious idea. It is 'the observance of the Lord's Day * * * of the Lord's Day which comes from the Christian Church and has connected with it a religious idea * * * and so far as the statute goes it enforces the sacredness attached to the day by a portion of the Christian Church."

In 1907 a Joint Committee of the Massachusetts Legislature to consider the Lord's Day Law suggested, among its recommendations for secularizing the law, that the designation of the statute be changed from the "Lord's day" to "Sunday" (Report of the Joint Special Committee, February 1907, Massachusetts Legislative Documents, (1907) House Document 1168, p. 9). No such action has ever been taken.

The Legislature has never designated by express provision the "Lord's Day" as the first day of the week though the duration of the day is fixed by Section 1 from midnight to midnight.[3] In the religious context of its origin, no

[3] Acts of 1844, Chapter 160, Section 2. Prior to that, the Lord's Day had extended from midnight to sunset (R. S. 1836, Chapter 50, Section 5, Statute 1782, Chapter 23, Section 6).

such designation was necessary since it was obviously the day of worship by the dominant Christian sects. It is interesting to speculate what a court would do if Sabbatarian sects became a majority in Massachusetts and argued that the Lord's Day must be interpreted as the day generally set aside for worship which would then be the seventh day.

Significantly, the Legislature has confined the designation "Lord's Day" to Chapter 136 and its predecessors, and to the form of indictment provided for violation of Chapter 136 found in Chapter 277, Section 79. Other provisions of the General Laws which do not seem to have the religious purpose of General Laws 136 refer to the first day of the week by its civil name—Sunday—rather than the Lord's Day; e. g., Chapter 276, Section 64, relating to bail on Sunday.

A further indication that the Legislature conceived the "Lord's Day" as a religious day is the provision for the sale from 6 to 10 in the morning, of kosher meat "by any person who, according to his religious belief, observes Saturday as the Lord's Day." (Acts of 1911, Chapter 328.) Obviously, "Lord's Day" in that context has religious signification.

C. The Legislature has Remained Committed to the Retention of Chapter 136 as a Religious Law.

As Massachusetts entered the Nineteenth Century, Puritanism began to give way increasingly to an open society of many sects and creeds; and there was increasing protest against the compulsive sanctions of the Lord's Day Laws. The Quakers and the Unitarians were among the earliest of these dissenters (F. I. Bronner, "Observance of the Lord's Day, 1800 to 1865," p. 70, unpublished PhD. Thesis, Harvard College Library). They believed, as Lucretia Mott put it, in the "consecration of man" and not the "consecration of days." (Proceedings of the Anti-Sabbath Convention held in Boston, 1848, p. 94.)

About 1829 William Ellery Channing, in his "Remarks on Associations", deprecated Lord's Day legislation believing that observance of the Lord's Day was a matter in which "the individual must be his own judge." (Works of William Ellery Channing, Boston, 1877, pp. 155-158.) He characterized the ritualistic character of some Lord's Day observances as superstition (p. 158). Theodore Parker couched this objection in stronger language in the Resolutions he introduced at the Anti-Sabbath Convention of 1848. (Proceedings, p. 50.)

William Lloyd Garrison, writing in the Liberator in 1836, was not opposed to voluntary religious observance of the first day of the week, but was:

> "decidedly of opinion that every attempt which is made to enforce the observance as a peculiar 'holy day' by pains and penalties whether civil or ecclesiastical is positive tyranny, which ought to be resisted by all the Lord's freemen, all who are rejoicing in the glorious liberty of the sons of God."
>
> (Cited in *William Lloyd Garrison by his children*, Volume 2, pp. 111-112, 1835-1840.)

In 1851 a group filed a petition with the Massachusetts House of Representatives for the repeal of all Lord's Day Laws. Their reasons reminiscent of the Anti-Sabbath Convention of 1848 were:

> "1. Because there exists among the people an equally honest and conscientious difference of opinion as to the holiness of particular days, and the mode of their observance;
>
> 2. Because it is contrary to the fundamental idea of a republican government, that conscience should be coerced into conformity by law, or that special rights and privileges should be given to a particular religious belief;
>
> 3. Because the question of the holiness of days,—like that of public worship, the support of the clergy,

the observance of ordinances,—should be left in its decision to individual conscience, and made to depend on its own merits, without the intervention of the state; and

4. Because, as it has been found safe, politic and beneficial to allow the people to decide for themselves in all other religious matters, there is no reason to doubt that the same good results would follow the repeal of the Sabbatical Laws."

(House document No. 125, Massachusetts Legislative Documents, 1851.)

The Committee on the Judiciary of the House of Representatives recommended that the petition be rejected, concluding as follows:

"But they [the Committee] cannot leave the subject [observance of the Lord's Day] without expressing their reverent respect for a social and religious institution, handed down to us by pious men from the time of the Apostles, throughout all the long ages of the Christian Church, and still venerated in every part of Christendom." (*Ibid.*)

The House accepted the Report of the Committee on April 21, 1851 (House Journal, 1851, p. 566).

However, additional forces were at work. The urbanization and industrialization of Massachusetts during the Nineteenth Century hardly requires documentation. Consequently, an experiment in the rigid enforcement of the Lord's Day law in Boston at the end of 1906 resulted in a public outcry. (Press Comments appended to Report of Joint Special Committee to Revise the Lord's Day Law, p. 91, House Document 1160 of 1907—and this in spite of some exceptions in 1887 (Acts of 1887, Chapter 391).) Meanwhile a Joint Special Committee had been appointed by the Legislature to "revise, consolidate and arrange the General Laws of the Commonwealth relating to the observance of the Lord's Day." (House Document No. 1160 Massachusetts Legislative Documents, 1907.) The majority

of the Committee recommended a secularization of the law. They suggested that the name "Sunday" should be substituted for "Lord's Day"; and that the day be used as a day of rest (p. 9). The Committee thus recommended legislation to provide one day of rest in seven for all employees—those who were obliged to work on Sunday as well as those who did not work on Sunday (p. 9). The Committee also recommended the opening of libraries and museums for which no admission fee was charged (p. 14), and that the exception for "works of necessity and charity" should be broadened to "works of necessity or charity, and works or acts needful during the day for good order, health, safety or comfort of the community (p. 13)."

The Legislature in 1908 paid little attention to these recommendations. It refused to pass a day of rest law (House 336—Massachusetts Legislative Documents, 1908).[4] It also refused to pass a law to keep open public libraries on Sunday (House 339—Massachusetts Legislative Documents, 1908).[5] The only changes made in what are now Sections 5 and 6 were a few additional exceptions for clam digging, dressing fish, taking photographs, unpaid labor on yachts and boats, and the delivery of ice cream. This episode documents the observation of Professor Mark De Wolfe Howe in the Boston Globe, June 2, 1959, p. 27, commenting on the court below's decision in this case:

> "For 100 years, as Judge Magruder points out in his opinion, the General Court has refused to do anything more constructive than undermine an ancient and no longer tolerable policy of preferential establishment by creating exceptions to the general prohibition against secular activities on the Lord's Day."

---

[4] It was not until 1913 that the predecessor of Chapter 149, Section 48 provided a day of rest for all employees, was passed. Acts of 1913, Chapter 619, Sections 1, 6.

[5] Query: whether the attendants at the Harvard Law School Library which is open on Sundays from 2:00 to 10:00 are not presently in violation of the law?

ıer exceptions have been added. It does
ble to attempt to rationalize the hodge-
lge Magruder describes in his opinion
The last two exceptions have been the
pter 304, authorizing the sale of live bait
day, and the Act of 1957, Section 356,
le of frozen dessert mix.

rs the Legislature has been sparing in
hus, in 1959 for example, the Legislature
o exempt Sabbatarians (House 2010—
gislative Documents, 1959) from Section
toto. It also defeated bills modifying
Laws which would have permitted the
washing establishments during certain
)8); which would have permitted the all
l (House 2007) (bread may now be sold
und from 4 to 6:30 P. M.); which would
ıe sale of alcoholic beverages at bars and
1587) (it may now be consumed only
would have permitted the sale and return
rs of farm products (S-233); and which
tted hunting (House 1844). This seems
titude of the Legislative Commission
to "investigate and study the provisions
ng to observance of the Lord's Day."
recommended that no changes be made,
eport as follows (House 2413—Massa-
ve Documents 1954—p. 9):

opinion that further secularization of the
is undesirable, and for that reason we
ommend that the laws pertaining thereto
liberalized. The wave of materialism
weeping the country makes it most im-
it one day be set aside for worship, rest
all persons an opportunity to strengthen
of our American civilization—the home."

D. Judicial Decisions Have Determined the Scope and Applicability of the Lord's Day Laws From Their Religious Basis.

The Supreme Judicial Court, even after *Commonwealth* v. *Has*, 122 Mass. 40, has referred to the religious basis of the Lord's Day Laws as the touchstone for determining "rights and liabilities" under it. (*Society for Savings in the City of Cleveland* v. *Bowers*, 349 U. S. 143, 151.) Like the Legislature, the Supreme Judicial Court has been faced through the years with the issue of exceptions to the broad prohibition of Section 5. The Legislature has dealt with this issue, as indicated, by imposing a number of Nineteenth and Twentieth Century exceptions on the Seventeenth and Eighteenth Century base. The Supreme Judicial Court, however, has dealt with the problem in terms of the application and scope of the exception for "charity and necessity." Here, too, the religious origin and context of the phrase has been decisive. This is made explicit in *Commonwealth* v. *White*, 190 Mass. 578, decided in 1906, 29 years after *Commonwealth* v. *Has*. The Court there held that picking cranberries on Sunday was not a work of necessity although the crop was unusually large. In that case the Court began its analysis as follows:

> "In construing this statute it is to be borne in mind that, so far as material to the question before us, it is simply the continuation of a law which from a very early time in the history of the Colony has been constantly upon our statute books. It is one of a series of statutory provisions enacted to secure the proper observance of the Lord's day, as understood by our forefathers. Their idea of the Lord's day, the manner in which it should be spent, and the object of the system of statutes passed from time to time to secure its proper observance are set forth in the various preambles to those statutes."

The court then recites the preambles to the Provincial Statutes of 1760-1761, Chapter 20, Section 1, and to Statute 1791, Chapter 58:

Provincial Statutes of 1760-1761, Chapter 20, Section 1:

> "Whereas it is the duty of all persons, upon the Lord's day, carefully to apply themselves publicly and privately, to religion and piety, the prophanation of the Lord's day is highly offensive to Almighty God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons."

Statute 1791, Chapter 58:

> "Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labor and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct; for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society; to the great disturbance of well disposed persons, and to the great damage of the community, by producing dissipation of manners and immoralities of life."

The court then went on to say:

> "But changes in the view of people as to the nature of the Lord's day, or as to the manner in which it should be spent, whether such changes are for the better or for the worse, are not to be considered. So far as respects such changes alone the word 'necessity' has the same meaning as when first inserted in this system of statutes. It was originally inserted to secure the observance of the Lord's day in ac-

> cordance with the views of our ancestors, and it ever since has stood and still stands for the same purpose. In interpreting it, the precepts set forth in the preambles above quoted must still be borne in mind."

This case is cited in *Commonwealth* v. *McCarthy*, 244 Mass. 484 (1923), which held that the delivery of bread outside a baker's premises on Sunday is not a work of necessity. The Court said at page 486:

> "The statute prohibiting the performance of labor, business or work, except works of necessity and charity, on Sunday, was enacted to secure respect and reverence for the Lord's day. 'That the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements * * * Whatever inconvenience might result at the present day from the literal and general enforcement of the Lord's day act, and whatever hard cases may have arisen under it, it is still the law of the land, to be judicially interpreted and administered according to its true intent and meaning, and upon the same rules as would govern us in the interpretation of any other statute.' *Davis* v. *Somerville*, 128 Mass. 594, 596."

The result of such religious interpretation has been a plethora of distinctions no more amenable to rationalization than those made by the Legislature.

In *Commonwealth* v. *Dextra*, 143 Mass. 28, the court held that keeping open a barber shop violated the Lord's Day law since the exception (contrary to the apparent understanding of the lower court judge and the complaining authorities) did not apply to keeping open a shop. The court, after reviewing the Seventeenth and Eighteenth Century origins of the Statute said at page 31:

> "This statute is substantially the same as that enacted in 1791, Chapter 58. The preamble to that latter statute sets forth at length the reasons of its

> passage, and is applicable to the statute now in force, as well as to the several laws enacted upon this subject since that time."

On the other hand, a plaintiff who shaved another in his home and sued for services could recover since a jury could have found this was a work of necessity. *Stone* v. *Graves*, 145 Mass. 353. In that case the court held that it was for the jury to decide whether "it was morally fit and proper that the plaintiff should shave him." Yet, one who gratuitously assisted another in cleaning a wheelpit on Sunday and was injured through negligence could not recover since this was not a work of necessity and charity as a matter of law. *McGrath* v. *Merwin*, 112 Mass. 467 (1873).

The cases involving travelling on Sunday (previously also forbidden except for necessity and charity), also indicate the difficulty involved in applying religious considerations to everyday situations. *Davis* v. *Somerville*, 128 Mass. 594 (1880), held that travelling to and from a funeral was a journey of necessity and charity while a detour to call upon a friend on the return trip was not; thus, the plaintiff injured by a defect in the highway while making this detour on Sunday could not recover for negligence. However, travelling to the home of a sick friend was a journey of necessity and charity. *Doyle* v. *Lynn and Boston Railroad Company*, 118 Mass. 195 (1875); and the plaintiff could recover from the railroad for negligence though travelling on Sunday. Recovery was, however, denied to one injured while travelling on Sunday to ascertain the condition of the home into which he was to move the next day. The court held that this was not a journey of necessity and charity. *Smith* v. *Boston and Maine Railroad*, 120 Mass. 490 (1876).

A contract made on Sunday is invalid because it is "secular business". *Kimball* v. *Thompson*, 13 Mass. 283, 286 (1864). But the creation of a trust for the settlor's support, funeral expenses, etc., was held valid in *Donovan*

v. *McCarthy*, 155 Mass. 543 (1893), since the exception for necessity and charity covered "everything which is morally fit and proper to be done under the peculiar circumstances of the case (p. 547)." Thus, in *Bennett* v. *Brooks*, 9 Allen 118 (1864), the court held that a will may be made on Sunday since it does not "appertain to ordinary wordly business (p. 122)." The court pointed out "the serious and solemn nature" of a last testament. This general notion would seem to be at the basis of the court's holding in *Carton* v. *Shea*, 312 Mass. 634 (1947), that the work of undertakers is a work of "necessity and charity."

II. The Lord's Day Law is a law respecting an establishment of religion and, therefore, in violation of the Fourteenth Amendment of the United States Constitution as it incorporates the First Amendment.

If illustration is necessary of the wisdom of the constitutional prohibition against "legislation for the support of any religious tenets or the modes of worship of any sect" (*Davis* v. *Beason*, 133 U. S. 333, 342) and against coercing any one "to observe a religious holiday" (*Zorach* v. *Clauson*, 343 U. S. 306, 314), such illustration is found in the history of Chapter 136, "Observance of the Lord's Day". This brief has given some indication of the divisive character of this Statute—from at least the early Nineteenth Century to this case in which the Seventh Day Adventists and a Jewish Rabbi were ranged against the Lord's Day League of New England and the Archdiocesan Council of Catholic Men (Record, p. 134).

This brief also indicates the determination of the Legislature to retain the avowed religious purpose of the statute and the reliance of the Supreme Judicial Court—despite the characterization in *Commonwealth* v. *Has*, *supra*—on religious considerations in adjudicating rights and liabilities under that statute. The resulting arbitrary hodgepodge gives modern point to Madison's Memorial and

Remonstrance against Religious Assessments (Appendix to *Everson* v. *Board of Education*, 330 U. S. 1, 67). He objected to the proposed Virginia law:

> "Because the bill implies either that the Civil Magistrate is a competent Judge of religious truth; or * * * the first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world."

See also:

> *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, at 505.

Nor can this court substitute a secular basis for this statute. A corollary to the presumption of constitutionality of state legislation would seem to be the principle of judicial non-interference. But that principle, as this court has pointed out in an analogous situation in *Securities Commission* v. *Chenery Corp.*, 318 U. S. 80, 88, is applicable "for purposes of affirming no less than reversing an administrative order". Paraphrasing the Court:

> A judicial judgment cannot be made to do service for a legislative judgment. For purposes of validating no less than invalidating legislation, a federal court cannot intrude upon the domain of the state. This court cannot ignore the avowed religious considerations at the foundation of the Lord's Day law from their origin to the present. It cannot assert that the legislature would have in any event passed this law as a day of rest law. Indeed, the legislature was, as indicated above, not concerned with a day of rest law until 1913; and then it passed what is now Chapter 149, Section 48. What, if any, changes Chapter 149, Section 48 may require, if the religiously based Lord's Day law cannot stand, is for the legislature, not this court, to determine.

Thus, a summary answer to attempts to retain this law as a day of rest law is that the Legislature has avowedly chosen to retain it as a religious law. This is the answer which this court gave to a similar *ad hoc* attempt to save a state statute. *McLeod v. Dilworth*, 322 U. S. 327, 330. *Civil Rights Cases*, 109 U. S. 3, 19. See also: *The Propeller Genessee Chief*, 12 Howard 443.

CONCLUSION

It is, therefore, respectfully submitted that General Law Chapter 136, and particularly Section 5, is unconstitutional.

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APPENDIX

Massachusetts General Laws (Tercentenary Edition), Chapter 136, "Observance of the Lord's Day".

Section 5. (Keeping open shops or warehouses and conducting business or doing work on the Lord's day.) Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars.

Section 6. (Limit of operation of section 5.) The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen des-

sert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate, necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their power, and the towing of disabled motor vehicles; the the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof; or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of

livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter or cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or

private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him. (As revised by St. 1934, c. 373, sec. 6; St. 1946, c. 207, sec. 4; and St. 1957, c. 356, secs. 16 and 17; as added by St. 1949, c. 190 and St. 1950, c. 322; and as amended by St. 1959, c. 256, sec. 1.)